

82-2107

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1982

STATE OF ALABAMA,

Petitioner

v.

HENRY TAYLOR,

Respondent

PETITION FOR A WRIT OF
CERTIORARI TO THE SUPREME COURT AND
COURT OF CRIMINAL APPEALS OF ALABAMA

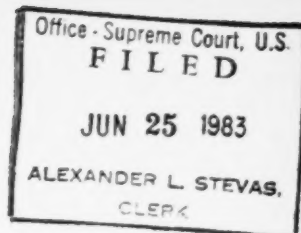
OF

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ATTORNEYS FOR PETITIONER



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QUESTION PRESENTED

Where a party, who is not under arrest or otherwise restrained because of a certain charge, is indicted for said charge but for a substantial period of time after indictment the indictee cannot be located and arrested pursuant to the indictment and during said period of time the indictee is utterly unrestrained as regards the indictment and charge, should the delay of trial resulting from unsuccessful efforts to locate the indictee during such period be judged by due process standards or speedy trial standards?

THE PARTIES

In the Circuit Court of Jefferson County, Alabama, the Court of Criminal Appeals of Alabama and the Supreme Court

of Alabama, the parties were: The State of Alabama, who is the Petitioner herein and Henry Taylor, who is Respondent herein.

The matters at issue here were first raised in the Circuit Court of Jefferson County, Alabama and have been at issue throughout these proceedings.

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OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Alabama reversing and rendering Respondent Taylor's conviction is not as yet reported but will be reported as follows:

Taylor v. State, _____ So.
2d _____ (Cr. App. Ala.,
1983)

A copy of the same is submitted in Appendix "A" to this petition.

The order of the Supreme Court of Alabama denying the writ of certiorari in this case are not as yet reported but will be reported as follows:

Ex parte: State; In re:
Taylor v. State, _____ So.
2d _____ (S. Ct. Ala., 1983)

A copy of the same is submitted in Appendix "B" to this petition.

JURISDICTION

The order of the Supreme Court of Alabama denying the writ of certiorari in this case was issued on April 29, 1983, and this petition is filed within sixty days of that date.

The Jurisdiction of this Honorable Court is invoked under 28 United States Code, Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Court of Criminal Appeals of Alabama found that Respondent Taylor was denied his right to a speedy trial under the Sixth Amendment to the Constitution of the United States, which reads as follows:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been

committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." (Emphasis supplied)

The Petitioner State insists that Respondent Taylor's claim should have been decided under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, which reads as follows:

"...All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws..." (Emphasis supplied.)

STATUTORY PROVISIONS INVOLVED

Respondent Taylor was convicted of common law robbery and sentenced under Title 13, Section 13-3-110, Code of Alabama, 1975. See Appendix "C".

STATEMENT OF THE CASE AND THE FACTS

The Court of Criminal Appeals of Alabama accurately stated the case and the facts which led to Respondent Taylor's speedy trial claim, as follows:

"The defendant was indicted and convicted for robbery. Alabama Code Section 13-3-110 (1975).

Sentence was ten years' imprisonment. The only issue argued on appeal is the denial of the defendant's Sixth Amendment right to a speedy trial.

"The facts governing this issue are set forth in chronological order.

"May 24, 1976 Robbery committed.

"May 26, 1976 The defendant was arrested. He was on parole for a previous unrelated offense.

"July 26, 1976 Sometime after this, the defendant's parole was revoked because of the robbery charge and the defendant was returned to Kilby State Penitentiary. The District Attorney had a hold placed against the defendant.

The grand jury 'no billed' the charges against the defendant. This was an error or mistake resulting from confusion over the names of the three men involved in the robbery and the role each played.

Sometime after this action by the grand jury, the hold against the defendant was withdrawn.

"September 10, 1976 The defendant was indicted.

"September 28, 1976 An arrest warrant for the defendant was returned not executed for the following reasons checked on the warrant: 'moved, no forwarding address'; 'incorrect address'; 'not employed at listed location'.

At this time the defendant was still in the state penitentiary.

"July 27, 1977 The defendant was released from prison after completing his sentence. No limitations requirements or restrictions were placed upon his activities upon release. There were no 'holds' or detainers against the defendant.

Upon release, the defendant moved to Montgomery^[1] where he openly resided and worked until his arrest.

¹The instant case arose in Fultondale, Jefferson County, Alabama; the City of Montgomery is located in Montgomery (con't)

- "January 3,
1978 A second arrest
warrant was issued
for the defendant
and returned marked
'does not reside at
address; not known
at this address'.
This address was the
same as that of the
warrant of September
26, 1976.
- "December 27,
1978 The defendant's
'court file' was
rebuilt after the
original had been
'lost or misplaced'.
The State Board of
Administrations (the
predecessor of the
State Board of
Corrections) was
ordered to have the
defendant present.
- "January 3,
1979 An 'alias capias
order' was issued
after the original
had been lost.
- "January 18,
1979 The case was set for
arraignment and the
Board of Corrections
was ordered to have
defendant present.

(footnote 1 con't)

County, Alabama. A distance of about one
hundred miles separates Jefferson and
Montgomery counties.

"January ?, 1981 After the defendant was involved in a traffic accident in Montgomery, he was arrested for the 1976 robbery.

"February 13, 1981 Counsel was appointed to represent the defendant and the defendant was arraigned. Trial was set for May 26, 1981.

"May 26, 1981 The defendant filed a motion to dismiss the indictment on the basis of the denial of a speedy trial. The motion was heard, evidence presented and denied.

"The defendant was tried upon a stipulation of facts and adjudged guilty.

"(The judgment entry recites that all of this occurred on May 25, 1981.)

(Taylor v. State, So. 2d
[Cr. App. Ala., 1983];
Appendix "A", pages 1-6)

To this need only be added: (1) After the detainer was withdrawn in 1976, no other detainers or warrants were lodged against Respondent Taylor with the prison authorities. He testified that he knew nothing of the instant charge until he was arrested on the indictment in January of 1981, about five (5) months before trial.²

2. Although the Court of Criminal Appeals may have put very little emphasis on it, the Court's statement as to Respondent Taylor's claim of loss of memory about the date of robbery is not exactly accurate. Actually, Respondent Taylor denied any knowledge at all of the

²"...I didn't know anything about it [i.e. the indictment] until I had a car wreck Christmas Eve night...." (R. 16)

robbery and even denied his May 26, 1976, arrest by the Fultondale police.³

3. Following the denial of his motion to dismiss, Respondent Taylor stipulated to the facts of the robbery in which he was the gunman. (R. 133-137)

On appeal the Court of Criminal Appeals of Alabama reversed and rendered Respondent Taylor's conviction on the grounds that he had been denied a speedy trial. The Court found that the delay in locating Taylor was long enough to trigger speedy trial inquiry. Although the Court found not even a suggestion of intentional delay on the part of the State, it did find that the State was negligent in not looking for Taylor in

3"...Q. Weren't you arrested on this charge by in Jefferson County on May 24, 1976?

"A. No." (R. 16)

the penitentiary during the first ten months of this time. The Court found that Respondent Taylor's assertion of his right on the day of trial, some five months after his arrest was not tardy. Finally, the Court, finding no evidence of prejudice, presumed prejudice from the length of the delay. On February 1, 1983, the Court of Criminal Appeals reversed and rendered Respondent Taylor's conviction. (Appendix "A")

The State applied for rehearing, but the application was overruled on March 1, 1983.

The State petitioned the Supreme Court of Alabama for review by writ of certiorari raising the issues raised here. The State's petition was denied on April 29, 1983. (Appendix "B")

SUMMARY OF THE ARGUMENT

At issue in this case is the question of what standards apply in measuring the delay of trial occasioned by unsuccessful efforts to locate indictees.

This Honorable Court has never had occasion to address the issue of post-indictment, pre-arrest delay. United States v. Marion, (404 U.S. 307, 30 L. Ed. 2d 468, 92 S. Ct. 455 [1971]), United States v. Lavasco, (431 U.S. 783, 52 L. Ed. 2d 752, 97 S. Ct. 2044 [1977]) and United States v. MacDonald, (456 U.S. 1, 71 L. Ed. 2d 696, 102 S. Ct. 1497 [1982]), the cases which are usually cited as controlling post-indictment delay each involved an arrest on the indictment within two weeks after the indictment's return.

This Honorable Court ought to address this issue for the following reasons: (1) Practical considerations, including the conflict between an accused person's right to be personally present at his criminal presecution and the limitations placed on the government interference with the liberty of movement of citizens; the practical difficulties in locating indictees, the seriousness of many cases which involve unlocatable indictees, and the high premium which is placed on evading criminal prosecutions when speedy trial standards are applied to post-indictment, pre-arrest delay, (2) Manifest confusion in the lower state and federal courts which result from efforts to apply speedy trial standards to an entirely inappropriate situation, and (3) the fact that the speedy trial policy and

standards bear no relation to the post-indictment, pre-arrest situation.

The policy of applying speedy trial standards to post-indictment, pre-arrest delay places form over substance, encourages the prosecution to delay presenting cases to grand juries and thereby contributes to trial delay while depriving unlocatable accused persons of the protection of grand jury proceedings.

ARGUMENT

Although Respondent Taylor was arrested in 1976, the case was "no billed" by the Grand Jury about two months later, and at that time the detainer which had been placed against him was removed. There is no suggestion of any speedy trial rights with regard to this period. See United States v. MacDonald, 456 U.S. 1, 71 L. Ed. 2d 696, 102 S. Ct. 1497 (1982)

From that time until his final arrest in January of 1981, the charges represented by the indictment had no legal or practical effect on Respondent Taylor.

At issue in this case is the period after indictment, during which Respondent Taylor's status as to the instant charges remained unchanged. Indeed, Respondent Taylor claimed that he knew nothing about the instant charges until his arrest some five months before trial. The Court of Criminal Appeals found that the State was negligent in its efforts to locate Taylor. However, the Court could not find any indication of intentional delay. The record will not support a suggestion that the prosecution was ever dropped or abandoned. If the officers charged with locating Respondent Taylor did not look for him in prison during the first ten

months, there is no indication that they had any reason for thinking he was in prison. If they didn't seek Respondent Taylor in Montgomery where he was allegedly living openly, there was no reason why they should seek him there either.

On the other hand, there is in this case no suggestion of actual prejudice to Respondent Taylor's defense. The Alabama Courts found prejudice presumed from the length of the delay. However, as will be discussed more thoroughly below, the presumption of prejudice is based on concerns which are irrelevant to Respondent Taylor.⁴

⁴See page 40-41, below.

In this case, the Court of Criminal Appeals blindly followed the speedy trial rules laid down by this Honorable Court in cases with facts radically different from those of the instant case. In fact, this Honorable Court has never addressed this particular issue at all; as more particularly appears below:

REASON FOR GRANTING THE WRIT:

THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW WHICH HAS NOT BEEN BUT OUGHT TO SETTLE BY THIS HONORABLE COURT.

I.

THIS HONORABLE COURT HAS NEVER ADDRESSED THIS QUESTION.

This Honorable Court has on several occasions addressed the question of pre-trial delay and has recognized and addressed three general types of pre-trial delay:

(1) where a person is arrested and later indicted ⁵ and still later brought to trial, this Court has held that the right to a speedy trial attaches at arrest and that the delay from the time of the crime until arrest is measured by general due process considerations.

Dillingham v. United States, 423 U.S. 64, 46 L. Ed. 2d 205, 96 S. Ct. 303 (1972)

(2) Where a person is not arrested until after indictment, this court has held that the right to a speedy trial attaches at indictment and the pre-indictment delay is measured by due process standards. United States v. Marion, 404 U.S. 307, 30 L. Ed. 2d 468, 92 S. Ct. 455 (1971); United States v. Lavasco, 431 U.S. 783, 52 L. Ed. 2d 752, 97 S. Ct. 2044 (1977)

⁵In this argument "indicted" will be used as a short expression for "indicted or otherwise formally charged."

(3) Where a person is arrested or indicted and the charges are dismissed without trial but the person is later re-arrested or re-indicted, the right to a speedy trial attaches at the second arrest or indictment and the due process standards control the prior delay.

United States v. MacDonald, 456 U.S. 1, 71 L. Ed. 2d 696, 102 S. Ct. 1497 (1982)

There is, however, a fourth common situation, which is presented by the instant case and which this Honorable Court has never had the opportunity to address. This is the situation where a party is indicted but cannot be located and for this reason is not arrested or otherwise restrained under the indictment for a substantial period of time thereafter. At first glance, it might appear that Marion, Lavasco and

MacDonald, above, control this situation and indeed most courts have so assumed, but a close examination of these cases reveals that this issue was not before the Court in those cases.

In Marion the defendants were indicted on April 21, 1970, and filed their motion to dismiss on May 5, 1970.⁶ They, therefore, had to have been arrested under the indictment within the ensuing twelve (12) days. The indictment in Lavasco was returned March 6, 1975,⁷ and the defendant moved to dismiss it on March 18, 1975.⁸ Thus,

⁶United States v. Marion, 404 U.S. 307, 308-309, 30 L. Ed. 2d 468, 472, 92 S. Ct. 455 (1971)

⁷United States v. Lavasco, 431 U.S. 783, 784, 52 L. Ed. 2d 752, 755, 97 S. Ct. 2044 (1977)

⁸Lavasco v. United States, Judge Henley's dissent, 532 F. 2d 59, 63 (8th Cir., 1976)

Lavasco too must have been arrested within twelve (12) days of the indictment. MacDonald was indicted on January 24, 1975, and "...He was promptly arrested and then released on bail a week later...." United States v. MacDonald, 435 U.S. 850, 852, 56 L. Ed. 2d 18, 22, 98 S. ct. 1547 (1978) Thus, the delay in locating and arresting the indictees in Marion, Lavasco and MacDonald did not exceed two weeks. The issue before the Court in Marion, Lavasco and MacDonald was the substantial time period between the crime and the indictment, not the inconsequential periods between indictment and arrest.

This case presents this Court's first opportunity to address the issue of substantial post-indictment, pre-arrest delay.

II.

THIS HONORABLE COURT SHOULD
ADDRESS THIS QUESTION.

The reasons this Court should address this issue fall into three categories: (1) The unique practical considerations in this area, (2) the confusion in the State and lower federal courts which results from (3) the application of the speedy trial standards of Barker v. Wingo, (407 U.S. 514, 33 L. Ed. 2d 101, 92 S. Ct. 2182 [1972]) to situations which are entirely different from that which gave rise to the Barker standards.

A.

PRACTICAL CONSIDERATIONS

The common situation of the unlocatable indictee presents unique

problems present in neither the investigatory phase prior to indictment nor the trial phase after the accused has been arrested.

First, there is the conflict a constitutional mandate and constitutional limitations, between a right of the inditcee as an accused person and the general rights of citizens to privacy and freedom of movement. On the one hand, an accused has the fundamental right to be personally present at his trial. Hopt v. Utah, 110 U.S. 574, 28 L. Ed. 262, 4 S. Ct. 202 (1884); Lewis v. United States, 146 U.S. 370, 36 L. Ed. 1011, 13 S. Ct. 136 (1892) In extraordinary circumstances an accused can be held to have waived such right. (Illinois v. Allen, 397 U.S. 337, 25 L.Ed. 2d 353, 90 S.Ct. 1057 [1973]), but the fact that the

police cannot locate an indictee would hardly justify dispensing with his personal presence at trial. On the other hand, freedom of movement is one of our basic liberties.⁹ In addition, constitutional limitations are placed on government in this country in order to guarantee every citizen's right to move about, change his address, job or life style without embarrassment or governmental interference. An unarrested indictee has these same protections, but governmental interference is exactly what is required if an indictee is to be

⁹"...Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values..." Kent v. Dulles, 357 U.S. 116, 126, 2 L.Ed. 2d 1204, 1210, 78 S.Ct. 1113 (1958)

arrested and brought before a court to answer charges. Thus, on the one hand, our Constitution requires the government to interfere with the indictee but, on the other hand, severely limits the government's power to interfere with citizens, including unarrested indictees.

In locating indictees the police are normally dealing with people who avoid police contact as a matter of course, especially when they have some reason to think that the police are interested in them. In seeking information and other assistance in locating an indictee, the police usually have to rely on friends and relatives of the indictee, persons more interested in assisting the indictee than the police. See, for example, People v. Yeager, 84 Ill. App. 3rd 415, 40 Ill. Dec. 549, 406 N.E. 2d 555, 558 (1980). In addition, prolonged delays in

arresting indictees usually result, as in the instant case, from the indictee's leaving the city or state where the charges are pending. In such cases reliance must be placed on the police agencies of other cities and states. While the cooperation among police agencies in this country is excellent, human nature being what it is, local cases take precedence over the needs of other jurisdictions. See, for example, State v. Larson, 623 P.2d 954, 656-657 (S.Ct. Mont., 1981).

In judging police efforts in locating indictees, the lower courts tend to use hindsight. The lower courts, for example, are quick to point out that the police could have located an indictee by examining the welfare rolls, (State v. Jones, 46 Or. App. 479, 611 P. 2d 1200 [1980]), or the veterans' affairs' agency, voter rolls or bank records in

another state, (People v. Yaeger, 84 Ill. App. 3d 415, 40 Ill. Dec. 549, 406 N.E. 2d 555, 557 [1980]), or by identifying the indictee's child on school rolls or the indictee's common law wife in a particular newspaper's birth announcements. (Vickery v. State, 408 So. 2d 182, 183 [Cr. App. Ala. 1981]).¹⁰ The courts can make such judgments, because with hindsight they know where the indictee was and what he was doing during the period when the police could not locate him. But, the police at such time had no way of knowing which records, newspapers or places to search for information. In addition, many of these records are not available except by court order.

¹⁰Cited and relied on by the Court of Criminal Appeals in this case.

Yet, the cases which involve delay resulting from failure to locate an indictee include some of the most serious cases which come before our courts. Persons who are able to avoid arrest for a prolonged period of time are often people with considerable skill or money or the backing of an organization. These include the professional criminals, racketeers and terrorists who present the gravest threats to our society and constitutional system.

A final practical problem concerns the placing of a high premium on the evasion of the law. Most, though not all, courts hold that an accused may not take advantage of delay which resulted from his actively avoiding arrest. However, it is usually impossible to say with any certainty whether the actions by the indictee which made him unlocatable

were intended to produce that result or merely did so coincidentally. Thus, applying speedy trial standards to post-indictment, pre-arrest delay in effect gives the indictee who is skillful enough to avoid detection without appearing to do so, the power to create a perfect defense for himself, without regard to the facts of the case.

B.

CONFUSION IN THE STATE AND
LOWER FEDERAL COURTS

In examining the question of post-indictment pre-arrest delay the lower courts universally apply the four part balancing test of Barker v. Wingo, (407 U.S. 514, 33 L.Ed. 2d 101, 92 So.Ct. 2182 [1972]), making few, if any, adjustments

for the peculiar problems of post-indictment, pre-arrest situation. As will be discussed in the next section, Barker was based on entirely different facts and most of its standards are difficult or impossible to apply in this situation.¹¹ The efforts of state and lower federal courts to fit the "square Barker peg" into the "round hole" of post-indictment, pre-arrest delay has resulted in such a jumble of authority that the constitutional effect of such delay depends entirely on the jurisdiction. For example:

The "triggering device," of Barker (407 U.S. 514, 530, 33 L.Ed. 2d 101, 92 S. Ct. 117 [1972]) length of the delay, has been found to have been set off by delays in locating the indictee of only a

¹¹See pages 41-42, below.

few months. E.G., six and a half months, State v. Jones (46 Or. App. 479, 611 P. 2d 1200, 1202, [1980]); nine months, State v. Holtslander, 102 Idaho 306, 629 P. 2d 702, 705 [1981]) and ten and one half months, State v. Ivory, (278 Or. 499, 564 P. 2d 1039 [1977]).

In judging the reason for the delay the courts tend to treat the failure to locate the indictee as being of about the same gravity as the failure to locate an important but not indispensable witness. As stated above, most courts refuse to allow an accused to profit by intentional efforts to evade arrest. State v. Lockman, 169 Conn. 116, 362 A 2d 920 (1975); cert. den. 423 U.S. 991, 46 L.Ed. 2d 309, 96 S.Ct. 403. However, at least one court found a denial of speedy trial on the basis of delay which resulted solely from the indictee's flight from

the state to avoid arrest and subsequent resistance to extradition. Prince v. Alabama, 507 F.2d 693 (5th Cir. 1975);¹² cert. den. 423 U.S. 876, 46 L.Ed. 2d 108, 96 S.Ct. 147; compare Prince v. State, 50 Ala. App. 368, 279 So. 2d 539 (1973). However, the courts generally refuse to hold actions by indictes which make them difficult to locate, against the indictes unless it can be proven that such actions were taken to avoid arrest, which is usually impossible to show. See People v. Yeager, 84 Ill. App. 3rd 415, 40 Ill. Dec. 549, 406 N.E. 2d 555 (1980). In judging the efforts of the police to locate the indictes, some Courts, as noted above (see pages 26-28), find negligence in the failure of the police

¹²This case was cited and relied on by the State courts in the instant case.

to follow any "available avenue of investigation" in locating the indictee. State v. Ivory, 278 Or. 499, 564 P 2d 1039, 1041 (1977) Other courts, hold the police only to "reasonable efforts." State v. Holtslander, 102 Idaho 306, 629 P. 2d 702, 707 (1981)

One of the Barker standards is the accused person's assertion of his right. Obviously, if an unarrested indictee appeared and asserted his right, the whole problem would be mooted. The Courts generally dispense with this part of the Barker rule, as did the Alabama Courts in this case.

In judging prejudice, most courts reject claims by defendants that they cannot recall the events of the date of the crime. People v. Yeager, above, 406 N.E. 2d 555, 559. Other Courts, like

Alabama's, hold that such claims demonstrate prejudice. State v. Larson, 623 P. 2d 954, 959 (S. Ct. Mont. 1981). Many Courts presume prejudice from the length of the delay (People v. Yeager, above), others require only a "...reasonable possibility of prejudice...." (State v. Ivory, above, 565 P. 2d 1039, 1044 [1977]). Still other courts hold that in the post-indictment, pre-arrest situation, the defendant must show actual prejudice to his defense (State v. Holtslander, above, 629 P.2d 702, 708 ff) that was caused by the delay. (State v. Jones, 46 Or. App. 479, 611 P. 2d 1200, 1202 [1980])

The confusion evidenced by this brief digest of the problem arises, as noted, from trying to apply the doctrine of Barker v. Wingo, (407 U.S. 514, 33 L. Ed. 2d 101, 92 S. Ct. 2182 [1972]) to a

situation not contemplated by this Honorable Court in that case.

C.

SPEEDY TRIAL IS BASED ON
CONCERNS AND IS JUDGED BY
STANDARDS WHICH ARE IRRELEVANT
TO POST-INDICTMENT, PRE-ARREST
DELAY

As pointed out above, this Honorable Court has never addressed or even been asked to address the issue of post-indictment, pre-arrest delay. Lacking guidance, the lower federal and especially the state courts have produced the chaos of holdings noted above by applying speedy trial standards developed in cases where the accused was present or at least available and ready for trial to situations where the accused cannot be located.

The very expression "speedy trial" implies that a trial is possible. Before there can be a trial the accused must submit to the jurisdiction of the Court or be brought into submission by arrest. The availability of the accused for trial was an explicit or implicit factor in every speedy trial decision ever issued by this Honorable Court. See, for example, Klopfer v. North Carolina, 386 U.S. 213, 18 L. Ed. 2d 1, 87 S. Ct. 988 (1967) (Defendant in Court); Smith v. Hooey, 393 U.S. 374, 381, 21 L. Ed. 2d 607, 613, 89 S. Ct. 575 (1969) (Defendant was available for trial on writ of habeas corpus ad prosequendum); Dickey v. Florida, 398 U.S. 30, 26 L. Ed. 2d 26, 90 S. Ct. 1564 (1970) (same as in Smith Hooey, above); Barker v. Wingo, 407 U.S. 514, 33 L. Ed. 2d 101, 92 S. Ct. 2182 (1972) (Accused in Court); Dillingham

v. United States, 423 U.S. 64, 46 L. Ed. 2d 205, 96 S. Ct. 303 (1975) (Accused arrested prior to indictment). However, until a trial becomes possible, it cannot be speedily held. A trial is simply not possible until the accused is located.

The rational basis for the right to a speedy trial has been stated many times by this Honorable Court. In Barker v. Wingo (above) this Honorable Court identified the interests which the right to a speedy trial is designed to protect:

"...This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired...." (407 U.S. 514, 533, 33 L. Ed. 2d 101, 118)

The problem of the impairment of the defense transcends speedy trial and is,

in fact, a due process consideration. See United States v. Marion, 404 U.S. 307, 324 ff, 30 L. Ed. 2d 468, 480 ff, 92 S. Ct. 455 (1971) and United States v. Lavasco, 431 U. S. 783, 789, 52 L. Ed. 2d 752, 758, 97 S. Ct. 2044 (1977). The point was put in context just six months before Barker, above, in Marion, above, when this court wrote:

"...Inordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective defense. But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy,

and create anxiety in him, his family and his friends...." (404 U.S. 307, 320, 30 L. Ed. 2d 468, 478; emphasis supplied)

Similarly, just last year this Honorable court wrote in United States v. MacDonald, (456 U.S. 1, 71 L. Ed. 2d 696, 102 S. Ct. 1497 [1982]):

"...The Sixth Amendment right to a speedy trial is thus not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the Due Process Clause and by statutes of limitations. The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges...." (456 U.S. 1, 8, 71 L. Ed. 2d 696, 704; emphasis supplied)

See also Moore v. Arizona, 414 U.S. 25, 27, 38 L. Ed. 2d 183, 186, 94 S. Ct. 188 (1973).

Thus, speedy trial concerns primarily the direct necessary effects of a pending criminal charge which the accused is being held to answer - pre-trial loss of freedom, the disruptive effect on the accused person's life and anxiety over the charge. This is the rational basis of the rule which presumes prejudice from a prolonged pre-trial delay after the right to a speedy trial has attached: The accused person's defense may not have been damaged, indeed he may never have had a defense, but he has been incarcerated or at least restrained in his movements, his life has been disrupted and he has suffered anxiety. However, none of this applies to post-indictment, pre-arrest delay. An indictee who cannot be located is not restrained in any way; he is exercising his freedom to the fullest. His life is unaffected by the unserved

warrant. If the indictee knows nothing about the indictment, he cannot be anxious about it; if he knows about it and doesn't surrender to answer it, his anxiety is self-imposed. Thus, the primary purposes of the right to a speedy trial are simply irrelevant to the post-indictment, pre-arrest situation.

The leading case on speedy trial is, of course, Barker v. Wingo (407 U.S. 514, 33 L. Ed. 2d 101, 92 S. Ct. 2182 [1972]), in which this Honorable Court created the four part balancing test. The delay in Barker was well over five years, Barker was in court throughout this period, and the rule announced in Barker was based on that fact. The four factors are firmly grounded on the availability of the accused for trial. Barker calls on the courts to balance the length of the delay, against the reasons for the

delay, against the accused person's assertion of his right, against prejudice. Now in the case of post-indictment, pre-arrest delay, the reason is always the same and is always insurmountable - the lack of personal jurisdiction over the accused. The accused can hardly be expected to assert his right if he either knows nothing of the charge or does and is avoiding arrest. The prejudice factors which relate to speedy trial are, as discussed in the previous paragraph, irrelevant to delay during which the accused was unaffected by the indictment. Thus, the Barker balancing test, excellent as it is in cases where the accused is available for trial, is irrelevant to the situation where the accused can not be located.

To say that speedy trial considerations do not apply to post-indictment,

pre-arrest delay is not to say that an accused who suffers actual prejudice is without a remedy. This Honorable Court has often recognized that due process rules protect against actual prejudicial effects of delays other than denial of speedy trial. United States v. Marion, 404 U.S. 307, 324 ff, 30 L. Ed. 2d 468, 480 ff, 92 S. Ct. 455 (1971); United States v. Lavasco, 431 U.S. 783, 789, 52 L. Ed. 2d 752, 758, 97 S. Ct. 2044 (1977)

The situation of an accused who has been indicted but not located and arrested is radically different from that of a party who has been arrested, whether before or after indictment, and is awaiting trial. However, the unarrested indictee's situation is nearly identical to that of the person who has been

neither arrested nor charged. At most the unarrested indictee's situation is like that of the party whose charges have been dropped. This Court addressed that situation in United States v. MacDonald, 456 U.S. 1, 8-9, 71 L. Ed. 2d 696, 704, 102 S. Ct. 1497 (1982).

For these reasons, post-indictment, pre-arrest delay occasioned by the inability to locate the indictee ought to be judged by due process standards or, if judged by speedy trial standards, there ought to be formulated standards appropriate to this situation.

III.

FORM OVER SUBSTANCE; THE DISCOURAGEMENT OF ORDERLY EXPEDITION.

In the final analysis, what is at issue here is a question of form over substance.

If the indictment in this case had not been returned until after Respondent Taylor's arrest, he would have had no speedy trial claim at all. United States v. Marion, 404 U.S. 307, 30 L. Ed. 2d 468, 92 S. Ct. 455 (1971); United States v. Lavasco, 431 U.S. 783, 52 L. Ed. 2d 752, 97 S. Ct. 2044 (1977); State v. Lockman, 169 Con. 116, 362 A. 2d 920 (1975); cert. den. 423 U.S. 991, 46 L. Ed. 2d 309, 96 S. Ct. 403; Preston v. State, 338 A. 2d 562 (S. Ct. Del., 1975) Respondent Taylor would have had no complaint that his arrest was delayed. Hoffa v. United States, 385 U.S. 293, 17 L. Ed. 2d 374, 87 S. Ct. 408 (1966) Certainly no one would have have presumed prejudice from a five month delay from arrest to trial. If during the period of this delay the officers had been seeking

the Respondent on a simple warrant based on an affidavit rather than a capias (warrant) based on an indictment, the Alabama Courts would have applied due process standards rather than speedy trial standards to this case. Under the due process standards Respondent Taylor would have had to show at a minimum that his defense was actually prejudiced by the delay - something he cannot do. The results would have been the same if, on realizing that Taylor could not be quickly located in September of 1976, the State had dismissed the indictment and then obtained a warrant. United States v. MacDonald, 456 U.S. 1, 71 L. Ed. 2d 696, 102 S. Ct. 1497 (1982) The nature of the legal paper which the officers sought to serve on Respondent Taylor was of controlling importance in this case, but why? What conceivable difference

could it make to Respondent Taylor, before, during or after his arrest that he was being sought on a capias rather than a simple warrant? Warrants and indictments are equally effective in commencing prosecutions for the purposes of the statute of limitations. See Title 15, Section 15-3-7, Code of Alabama, 1975; Appendix "C". Yet, because the officers were unable to serve a capias rather than a simple warrant, Mr. Taylor is automatically acquitted. This aggrandizement of form over substance is unreasonable and, as will be discussed below, defeats the policy of orderly expedition¹³ of cases in general and

¹³"...[T]he essential ingredient is orderly expedition and not mere speed...." Smith v. United States, 360 U.S. 1, 10, 3 L. Ed. 2d 1041, 1048, 79 S. Ct. 991 (1959) Quoted with approval in United States v. Marion, 404 U.S. 307, 313, 30 L. Ed. 2d 468, 474, 92 S. Ct. 455 (1971)

criminal cases in particular of which speedy trial is an intregal part.

Given that a simple warrant will not trigger the right to a speedy trial until it is executed and assuming, as most of the lower courts do, that an indictment does trigger speedy trial immediately, then the simple solution to the problem of the unlocatable indictee would be to dismiss the indictment and obtain a simple warrant. An even better policy would be to take no case before a grand jury unless the accused is in custody or under bail bond. A warrant would have, from the government's point of view, all of the advantages of an indictment without setting the running of the "speedy trial clock." A simple warrant would toll the Statute of Limitations and authorize the arrest and custody of the

accused, it would invoke the extraterritorial cooperation of other jurisdictions, it would be a suitable basis for a federal fugitive warrant and extradition. Once the accused was arrested on the simple warrant, the case could be presented to a grand jury. There are no disadvantages to the prosecution in this policy, but there are disadvantages to the judicial system and the accused.

Presenting a case to a grand jury takes time, often considerable time. If cases are presented to the grand jury only after accused persons are arrested, then trials must be delayed by as much time as it takes the grand jury to act. If there is a prolonged delay in locating the accused, then the accused person's trial would be further delayed by the grand jury proceedings. The government

does not need custody of an accused to indict him. The policy of "orderly expedition" would seem to encourage the prosecution to do what it can, when it can toward bringing cases to trial. Indictment is necessary for trial, and the prosecution ought to be encouraged to go to the grand jury as expeditiously as possible. Yet, the Alabama courts, like most of the lower courts, have adopted a policy which harshly taxes expeditious grand jury proceedings and thereby encourages delay.

It cannot, of course, be assumed that every case presented to a grand jury produces an indictment. This Honorable court has recognized that the grand jury proceeding provides valuable protection to innocent people. For

example, in Smith v. United States, (360 U.S. 1, 3 L.Ed. 2d 1041, 79 S.Ct. 991 [1959]), this Honorable Court wrote:

"...The Fifth Amendment made the rule mandatory in federal prosecutions in recognition of the fact that the intervention of a grand jury was a substantial safeguard against oppressive and arbitrary proceedings...." (360 U.S. 1, 9, 3 L. Ed. 2d 1041, 1048)

Perhaps of more practical significance is the fact that grand jury proceedings, being more solemn and formal than the procedures which attend the issuance of simple warrants, are less prone to clerical and similar errors than warrant procedures. The first time Respondent Taylor's case was presented to the Jefferson County Grand Jury the case was "no billed" because of clerical errors and the charges were dropped. By discouraging the expeditious presentation

of cases involving unlocatable accused persons to grand juries, the policy now followed in Alabama and most states and federal circuits deprives these accused persons of valuable protection. This is the direct result of applying speedy trial standards to post-indictment, pre-arrest delay. The Petitioner respectfully submits that the better policy would be to encourage the early presentation of these cases to grand juries. Under such a policy, many of these accused persons would never become indictees and would cease being accused.

CONCLUSION

In conclusion, the Petitioner, the State of Alabama, respectfully submits that the decisions, opinions and orders of the Honorable Court of Criminal Appeals and Supreme Court of Alabama in this case erroneously resolved an important question of U.S. Constitutional Law which this Honorable Court has not heretofore had the opportunity to address. For this reason the Petitioner prays that this Honorable Court will issue the writ of certiorari and review the decisions and opinion of the Honorable Courts of Alabama and on such review will reverse the decisions of said Courts holding that Respondent Taylor was deprived of his right to a speedy trial

by reason of the delay in locating him
after indictment.

Respectfully submitted,

CHARLES A. GRADDICK
ATTORNEY GENERAL

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

OF COUNSEL:

VALERIE LOFTIN
LEGAL RESEARCH AIDE

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, do hereby certify that on this _____ day of June, 1983, I did serve the requisite number of copies of the foregoing on the Attorney for Henry Taylor, Respondent, by mailing same to him, first class postage prepaid and addressed as follows:

Hon. G. Thomas Sullivan
Attorney at Law
2014 Sixth Avenue, North
Birmingham, Alabama 35203

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

ADDRESS OF COUNSEL:
Office of the Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130

82-2107

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1982

STATE OF ALABAMA,

Petitioner

v.

HENRY TAYLOR,

Respondent

APPENDIX

TO THE PETITION FOR A WRIT OF
CERTIORARI TO THE SUPREME COURT AND
COURT OF CRIMINAL APPEALS OF ALABAMA

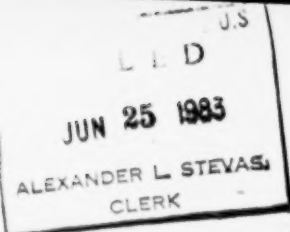
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ATTORNEYS FOR PETITIONER



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APPENDIX A

1 FEB 1983

THE STATE OF ALABAMA --- JUDICIAL
DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS
OCTOBER TERM, 1982-83

6 DIV. 735

Henry Taylor

v

State

Appeal from Jefferson Circuit Court
BOWEN, JUDGE

The defendant was indicted and convicted for robbery. Alabama Code Section 13-3-110 (1975). Sentence was ten years' imprisonment. The only issue argued on appeal is the denial of the defendant's Sixth Amendment right to a speedy trial.

The facts governing this issue are set forth in chronological order.

May 24, 1976 Robbery committed.

May 26, 1976 The defendant was arrested. He was on parole for a previous unrelated offense.

July 26, 1976 Sometime after this the defendant's parole was revoked because of the robbery charge and the defendant was returned to Kilby State Penitentiary. The District Attorney had a hold placed against the defendant.

The grand jury "no billed" the charges against the defendant. This was an error or mistake resulting from confusion over the names of the three men involved in the robbery and the role each played.

Sometime after this action by the grand jury, the hold against the defendant was withdrawn.

September 10, 1976 The defendant was indicted.

September 28, 1976 An arrest warrant for the defendant was returned not executed for the following reasons checked on the warrant: "moved, no forwarding address"; "incorrect address"; "not employed at listed location".

At this time the defendant was still in the State penitentiary.

July 27, 1977 The defendant was released from prison after completing his sentence. No limitations, requirements or restrictions were placed upon his activities upon release. There were no "holds" or detainers against the defendant.

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Upon release, the defendant moved to Montgomery where he openly resided and worked until his arrest.

January 3,
1978

A second arrest warrant was issued for the defendant and returned marked "does not reside at address; not known at this address". This address was the same as that of the warrant of September 26, 1976.

December 27,
1978

The defendant's "court file" was rebuilt after the original had been "lost or misplaced". The State Board of Administrations (the predecessor of the State Board of Corrections) was ordered to have the defendant present.

January 3,
1979

An "alias capias order" was issued after the original had been lost.

January 18, 1979 The case was set for arraignment and the Board of Corrections was ordered to have defendant present.

January ?, 1981 After the defendant was involved in a traffic accident in Montgomery, he was arrested for the 1976 robbery.

February 13, 1981 Counsel was appointed to represent the defendant and the defendant was arraigned. Trial was set for May 26, 1981.

May 26, 1981 The defendant filed a motion to dismiss the indictment on the basis of the denial of a speedy trial. The motion was heard, evidence presented and denied.

The defendant was tried upon a stipulation of facts and adjudged guilty.

(The judgment entry recites that all of this occurred on May 25, 1981.)

Employing the four part test enunciated in Barker v. Wingo, 407 U.S. 514 (1972), we find that the defendant was denied his constitutional right to a speedy trial.

Length of Delay: The length of delay was four years and nine months, from indictment in September of 1976 till trial in May of 1981. Under Barker, this is long enough to be presumptively prejudicial and "trigger" inquiry into the remaining Barker factors. Eleventh Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeal 1980-1981, 70 Georgetown L.J. 465, 611, n. 1183 (1981).

Reason for Delay: There is no valid reason for the delay. Although there is not even the insinuation of deliberate State delay to gain a trial advantage, the facts compel a finding of negligence

on the part of the State in locating the defendant.

The trial judge found that the State was not negligent "except during the first ten months. * * * If the State didn't know where he was then the State wouldn't be negligent." Our review of the facts convinces us that had the State been diligent in locating and prosecuting the defendant during "the first ten months" it would have known the defendant's location after his release from prison.

The record shows that when the defendant was indicted, and for almost eleven months thereafter, he was imprisoned in a state prison facility. Before the indictment was returned, the State knew where the defendant was located because the district attorney placed a hold against him in prison.

Sometime after his release from prison, the State, or at least the court, thought that the defendant was still incarcerated because it ordered the Board of Corrections to produce the defendant for arraignment. Between these two times it appears that the State simply "forgot" that the defendant was incarcerated. The public is entitled to "steady efforts" on the part of the prosecution "to see that criminal justice should be as swift and certain as may be consistent with the demands of fair and orderly procedure." United States v. Mann, 291 F.Supp. 268, 271 (S.D.N.Y. 1968). "(S)ociety has a particular interest in bringing swift prosecutions, and society's representatives are the ones who should protect that interest." Barker, 407 U.S. 527.

Under these circumstances, and mindful that the State is under an affirmative duty to try an accused within its jurisdiction within a reasonable time, we cannot hold that the State exercised diligence in its efforts to locate and prosecute the defendant.

Although negligence is not weighed as heavily against the State as a deliberate attempt to delay the trial in order to hamper the defense, Wade v. State, 381 So. 2d 1057, 1059 (Ala. Crim. App.), cert. denied, 381 So. 2d 1062 (Ala. 1980), it must nevertheless be weighed against the State "since the ultimate responsibility for such circumstances must rest with the government rather than the defendant." Barker, 407 U.S. at 531.

While negligence on the part of the State in bringing the accused to trial

will "not necessarily tip the scale in favor of the defendant", United States v. Carter, 603 F. 2d 1204, 1207 (5th Cir. 1979), "just simple government bureaucracy" and "sheer bureaucratic indifferences" weigh heavily against the State in determining whether an accused has been deprived of his right to a speedy trial. United States v. MacDonald, 632 F. 2d 258, 262 (4th Cir. 1980). "Simple bureaucratic inefficiency" must be weighed against the government. United States v. Greene, 578 F. 2d 648 (5th Cir. 1978).

Prejudice: The defendant asserts that the delay impaired his defense. He testified that he did remember what he was doing on the day the robbery was committed other than that he was probably at work. Although this is a "standard" contention in speedy trial cases, it must

be remembered that we have already found the length of delay presumptively prejudicial and consequently feel that we must give this allegation some credence. "Where delay is as long and as groundless as that revealed here, prejudice may fairly be presumed simply because everyone knows that memories fade (and) evidence is lost." Mann, 268 F.Supp. at 271.

Generally, a defendant's naked assertion of loss of memory is insufficient to make a showing of prejudice from delay which amounts to a denial of due process. Murray v. Wainwright, 450 F.2d 465, 471 (5th Cir. 1981).

"However, where the delay is not only excessive but the result of unexcused inaction or misconduct by the Government, it is prima facie prejudicial. United States ex rel. Solomon v. Mancusi, 412 F.2d 88, 91 (2nd Cir. 1969). In such a

case all the defendant need show is a faded memory. The burden then shifts to the Government which must demonstrate that defendant has not been prejudiced by the delay. Pitts v. North Carolina, 395 F.2d 182 (4th Cir. 1968); United States v. Blanca Perez, 310 F.Supp. 550 (S.D.N.Y. 1970)."
Murray, 450 F.2d at 471.

See also J. Cook, Constitutional Rights of the Accused- Pre-Trial Rights, p. 508, no. 22 (1972).

Here, the defendant has more than any generalized allegation of impaired memory to support his motion. A very significant prejudice suffered by the defendant is the loss of the opportunity to have his present sentence served concurrently with the time he served after revocation of his parole. Smith v. Hooey, 393 U.S. 374, 378 (1969), recognized that delay in bringing to trial on a pending charge one already in

prison under a lawful sentence "may ultimately result in as much oppression as is suffered by one who is jailed without bail upon an untried charge." The first "oppression" noted by the court was "the possibility that the defendant already in prison might receive a sentence at least partially concurrent with the one he is serving may be forever lost if trial of the pending charge is postponed." See also Prince v. Alabama, 507 F.2d 693 (5th Cir. 1975); Smith v. State, 409 So. 2d 958, 963 (Ala. Crim. App. 1981) ("The major prejudice incurred by the appellant was the preclusion of the possibility that the Alabama and Georgia sentences could run concurrently."); Ex parte Slaughter, 377 So. 2d 632, 633 (Ala. 1979) ("Petitioner also testified that he might have been

able to negotiate concurrent sentences.")

Assertion of the Right: The only assertion of the defendant's speedy trial right was made on the date his case was scheduled for trial in the form of a motion to dismiss. Under the circumstances and facts of this case, this assertion was not as tardy as it appears.

The defendant was arrested in January of 1981. This was the first indication he had of any pending charge against him. After the grand jury no billed the indictment against him and the prison hold was withdrawn, the defendant had no reason to suspect that any charge remained. Once he was released from prison without any detainer or similar restriction, the defendant had no reason to suspect that any further action had

been taken on the robbery charge. An accused cannot assert his right to a speedy trial where he has no knowledge of the indictment. Vickery v. State, 408 So. 2d 182, 184 (Ala. Crim. App. 1981).

Under the Sixth Amendment, a showing of unreasonable delay, plus substantial proof of prejudice, mandates a holding that the constitutionally guaranteed speedy trial has been denied. Barker v. Wingo; MacDonald, 632 F. 2d at 267. In weighing the factors of Barker, we find a presumptively prejudicial delay occasioned without justification or acceptable excuse resulting in actual prejudice to the defendant. Consequently, we find a violation of the defendant's constitutionally guaranteed right to a speedy trial. When a court finds a violation of the defendant's constitutionally guaranteed right to a

speedy trial, it must reverse the conviction, vacate the sentence, and dismiss the indictment with prejudice. Strunk v. United States, 412 U.S. 434, 439-440 (1973).

The judgment of the circuit court is reversed and rendered.

REVERSED AND RENDERED.

All Judges Concur.

STATE OF ALABAMA
MONTGOMERY COUNTY

)
)
)
)
)

6 Div. 735

HENRY TAYLOR

V.

THE STATE

Jefferson Circuit Court No. Cc 78-02475

March 1, 1983. IT IS ORDERED THAT THE
APPLICATION FOR REHEARING BE AND THE SAME
IS HEREBY OVERRULED. All the Judges
concur.

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
P. O. BOX 351
MONTGOMERY 36101

May 17, 1983

WILLIAM M. BOWEN, JR.
Presiding Judge

MOLLIE JORDAN
Clerk

JOHN C. TYSON, III

JOHN O. HARRIS

SAM TAYLOR

HUBERT L. TAYLOR

Judges

Hon. Bill North
Assistant Attorney General
250 Administrative Building
64 No. Union Street
Montgomery, AL 36130

RE: 6 Div. 735, Henry Taylor v. State

Dear Mr. North:

The Court of Criminal Appeals has today granted a stay of sixty (60) days from April 29, 1983 to allow filing of a petition for writ of certiorari in the United States Supreme Court. This stay will remain in effect until action is taken on the petition, and if the petition is granted, until a decision is rendered by the United States Supreme Court.

The certificate of final judgment has been recalled from the lower court pending determination by the United States Supreme Court, but the certificate will be reissued upon the expiration of the sixty-day stay unless this Court is furnished with proof of the filing of said petition in the United States Supreme Court.

Yours very truly,

/s/ Mollie S. Jordan
Clerk

xc: Hon. Polly Conradi
Circuit Clerk, Jefferson Circuit
Court

Hon. Tom Sullivan
Attorney for Appellant

File

APPENDIX B

MAILING ADDRESS:

TELEPHONE:

832-6480

P. O. Box 157
Montgomery, Alabama 36101

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

April 29, 1983

Re: 82-557

Ex Parte: State of Alabama
PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS
(Re: Henry Taylor
Appellant

vs.

State of Alabama)
Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

 Appeal docketed. Future correspondence should refer to the above number.

 Court Reporter granted additional time to file reporter's transcript to and including

Clerk/Register granted additional
time to file clerk's record/record
on appeal to and including

 Appell granted 7 additional
days to file briefs to and
including

 Appellant(s) granted 7 additional
days to file reply briefs to and
including

 Record on Appeal filed

 Appendix Filed

 Submitted on Briefs

XXXXXXPetition for Writ of Certiorari
denied. No opinion. Adams, J. -- Torbert,
C.J., Faulkner, Almon and Embry, JJ.,
concur.

 Application for rehearing overruled.
No opinion written on rehearing.

 Permission to file amicus briefs
granted.

/s/ Dorothy F. Norwood
Acting Clerk, Supreme Court of
Alabama

4/29/83

WO

APPENDIX C

CODE OF ALABAMA, 1975

TITLE 13

§13-3-110. Punishment.

Any person who is convicted of robbery shall be punished by imprisonment in the penitentiary for not less than 10 years, or as otherwise specified by law. (Code 1852, §126; Code 1867, §3668; Code 1876, §4311; Code 1886, §3742; Code 1896, §5479; Code 1907, §7746; Code 1923, §5460; Code 1950, T. 14, §415).

TITLE 15

§15-3-7, When prosecution deemed commenced.

A prosecution may be commenced within the meaning of this chapter by finding an indictment, the issuing of a warrant or by binding over the offender. (Code 1852, §406; Code 1867, §3954; Code 1876, §4646; Code 1886, §3714; Code 1896, §5074; Code 1907, §7350; Code 1923, §4934; Code 1940, T. 15, §225.)

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, do hereby certify that on this _____ day of June, 1983, I did serve the requisite number of copies of the foregoing on the Attorney for Henry Taylor, Respondent, by mailing same to him, first class postage prepaid and addressed as follows:

Hon. G. Thomas Sullivan
Attorney at Law
2014 Sixth Avenue, North
Birmingham, Alabama 35203

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

ADDRESS OF COUNSEL:
Office of the Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130

ORIGINAL

Supreme Court, U.S.
FILED

OCT 5 1983

ALEXANDER L. STEVENS
CLERK

NO. 82 - 2107

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1982

STATE OF ALABAMA,
PETITIONER,

VS.

HENRY TAYLOR,
RESPONDENT.

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF
CERTIORARI TO THE SUPREME COURT
AND
COURT OF CRIMINAL APPEALS OF ALABAMA

OF

G. THOMAS SULLIVAN
515 Twenty-First Street, North
Birmingham, Alabama 35203
(205) 323-1061

ATTORNEY FOR RESPONDENT

1

QUESTION PRESENTED FOR REVIEW

Where a party is arrested for robbery and his parole is revoked as a result of that arrest, and where the party is then indicted while still in prison but is released from prison eleven months later, informed that he was free and given no indication of the pendency of the robbery charge, and where that party is again arrested and tried for that robbery charge five years later, should Due Process or Speedy Trial standards apply.

PARTIES

In the Circuit Court of Jefferson County, Alabama, the Alabama Court of Criminal Appeals and the Supreme Court of Alabama, the parties were: The State of Alabama, the Petitioner herein, and Henry Taylor, who is Respondent herein.

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CONSTITUTION OF THE UNITED STATES,

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OPINIONS BELOW

Respondent adopts the citations set out in Petitioner's petition and brief.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C., §1257. Respondent acknowledges that this is the proper statutory authority for review of decisions of state courts. However, Respondent avers that under the particular facts of this case, this Honorable Court lacks jurisdiction under 28 U.S.C., §1257.

CONSTITUTIONAL PROVISIONS

The Court of Criminal Appeals of Alabama found that Respondent Taylor was denied his right to a speedy trial under the Sixth Amendment to the Constitution of the United States, which reads as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

Respondent adopts the statement of facts found by the Court of Criminal Appeals of Alabama as set out in Petitioner's petition and brief. To these facts Respondent would only add and underscore that at the time of this offense he was on parole from the Alabama penal system. As a result of his arrest and charge for this offense in May 1976, two days following its commission, his parole was revoked¹ and he was once again committed to prison at Kilby Correctional Facility.² Respondent remained so incarcerated until July 7, 1977 when he was fully released from state

-
1. §15-22-32. DECLARATION OF PAROLE VIOLATOR AS DELINQUENT; PAROLE COURT TO BE HELD UPON RETURN OF PRISONER.

Whenever there is reasonable cause to believe that a prisoner who has been paroled has violated his parole, the Board of Pardons and Paroles, at its next meeting, shall declare such prisoner to be delinquent, and time owed shall date from such delinquency. The warden of each prison shall promptly notify the Board of the return of a paroled prisoner charged with violation of his parole. Thereupon, such Board shall, as soon as practicable, hold a parole court at such prison or at such other place as it may determine and consider the case of such parole violator, who shall be given an opportunity to appear personally or by counsel before such Board and produce witnesses and explain the charges made against him. The Board shall, within a reasonable time, act upon such charges and may, if it sees fit, require such prisoner to serve out in prison the balance of the term for which he was originally sentenced, calculated from the date of delinquency or such part thereof as it may determine; however, the delinquent parolee shall be deemed to have begun serving the balance of the time so required on the date of his rearrest as a delinquent parolee. (1939, No. 275, p. 426; Code 1940, T. 42 §12; Acts 1951, No. 599, p. 1030; Acts 1975, No. 184, §1.)

2. Kilby Correctional Facility is located in Elmore County, adjacent to Montgomery. A distance of approximately one hundred miles separates Elmore and Jefferson Counties.

custody.³ During his fourteen months in the penitentiary, spent solely due to his being charged with this crime, Respondent heard nothing further concerning this charge. He heard nothing further until 1981 when he was arrested, apparently on an NCIC hit, after he was involved in a traffic accident.⁴ He was then taken to Birmingham and again incarcerated, where he remained until trial on May 26, 1981.

Respondent stipulated a prima facie case of robbery, was adjudged guilty, sentenced to ten years and appealed, raising the issue that he had been deprived of his right to a speedy trial. The Court of Criminal Appeals reversed (Appendix A), and the State applied for rehearing which was denied without opinion. (Appendix A) The State then petitioned the Supreme Court of Alabama for writ of certiorari, which was again denied without opinion. (Appendix B)

3. Q. [Mr. Hughes, counsel for Respondent] When you were released in July of 1977, what was your understanding was the reason for your release?

MR. SOWA: I object to that.

THE COURT: Just ask him --

Q. Why were you released?

A. I had did my time. They told me I was sent to the penitentiary for robbery. And I thought that I had did the time. (R. 7-8)

Q. [Mr. Hughes] When you were released from prison in July of 1977, as far as you know, were there any holds on you?

A. No, sir.

Q. And you hadn't escaped?

A. No, sir, I hadn't. They gave me my go-free papers in my hand. (R. 9-10)

4. Q. [Mr. Sowa] Then by out of the state, you meant the state prison, sir?

A. Right, that's what I mean.

Q. Okay.

A. And my wife, she signed the papers for me to get out, and there wasn't a warrant. Didn't nobody tell me about a warrant. I didn't know anything about it until I had a car wreck Christmas Eve night. And I was sitting at home and the police officer came and got me and told me that they had a warrant for my arrest in Jefferson County. And I asked him, I said for what. And he said all we know is that we have just got a warrant, Henry. That's all we know. (R. 16)

SUMMARY OF ARGUMENT

Speedy trial provisions of the Sixth Amendment are engaged by formal indictment or when actual restraints of arrest and holding to answer a criminal charge are imposed. U.S. v. Marion, 404 U.S. 308, 30 L.Ed.2d 468, 92 S. Ct. 455 (1971). Respondent was arrested on May 26, 1976 and indicted in September 1976. He was incarcerated for over a year as a result of being charged with this crime, that being in the form of a parole revocation. Thus, though not actually arrested on a capias until January 1981, Respondent was actually held in prison fourteen months solely because of the charge. Consequently, Petitioner's representation that this case involves a simple post indictment - pre arrest delay is misleading and of questionable merit. This case poses a basic Speedy Trial scenario and was properly decided by the appellate court on the basis of Barker v. Wingo, 407 U.S. 514, 33 L.Ed.2d 101, 92 S. Ct. 2182 (1972), Smith v. Hooyey, 393 U.S. 374 21 L.Ed.2d 607, 89 S. Ct. 575 (1969), and Klopfer v. North Carolina, 386 U.S. 213, 18 L.Ed. 2d 1, 87 S. Ct. 988 (1967).

Further, Respondent contends that this Honorable Court lacks jurisdiction to hear this cause as the allegations contained in Petitioner's petition were not raised at any point at the trial level, in post trial motions or on appeal at the first instance. The Due Process argument was first made in application for rehearing in the Court of Criminal Appeals and was not ruled on, the application being denied without opinion. (Appendix A) It is well established that an issue not raised until rehearing and not ruled on in the state appellate courts cannot be raised to confer jurisdiction under 28 U.S.C., §1257. Hanson v. Denckla, 357 U.S. 235, 2 L.Ed.2d 1283, 78 S. Ct. 1228 (1958), Herndon v. Georgia, 295 U.S. 441, 79 L.Ed.2d 1530, 55 S. Ct. 794 (1935), Cardinale v. Louisiana,

394 U.S. 437, 22 L.Ed.2d 398, 89 S. Ct. 1162 (1962), Illinois v.
Gates, ___ U.S. ___, 76 L.Ed.2d 527, 103 S. Ct. 2317 (1983).

ARGUMENT

As a result of his being charged with robbery Taylor's parole was revoked and he was recommitted to the state penitentiary. This set in motion a sequence of events which illustrate great ineptitude on the part of the prosecuting authorities. It was the intent of the District Attorney to No Bill the case against one of three men charged with the robbery in question, and that man was not to be Respondent. However, the recommendation was made erroneously to the Grand Jury and Respondent's case was No Billed. The detainer (hold) on Respondent was then released by the District Attorney. The Prosecutor soon realized his error and in September 1976 secured a true bill against Taylor. However, he did not order the detainer placed against him.⁵ Eleven months thereafter Taylor completed his revocation sentence and was released, there being no order to detain him.

The sheriff had attempted to serve the capias on Taylor at a Birmingham address in September 1976 but did not find him. This was because Taylor was in prison one hundred miles away. In January 1978 a second attempt to serve him was made at the same address and again he was not found to be there. He was now free from prison after serving fourteen months and was living near the prison in Montgomery.

5. MR. SOWA: Simply that at one time his case was No-Billed by the state. He was in prison at that time.

THE COURT: In other words, it was when his parole was revoked?

MR. SOWA: After he had been revoked.

THE COURT: Yeah, and then it was No-Billed?

MR. SOWA: According to John Black. That's my information. Then they realized they had made a mistake, that they meant to True-Bill two of the men. There were three in the car. They thought they had the third man, you know, and they had no evidence sufficient to go forward. And instead they mistook the two. And then they later realized their mistake and True-Billed it. (R. 24-25)

During the next twelve months his file was lost and was "rebuilt". Afterwards, the prison authorities were ordered to have him present in December 1978. He was not brought because he had been free from custody since July 27, 1977. The capias warrant was lost, an alias was procured and in January 1979 the prison authorities were again ordered to bring Taylor up during that month. As the month before, he was not brought because he had been free for seventeen months. In 1981 Taylor was involved in a wreck in Montgomery and in a routine check the warrant was discovered. He was arrested, taken back to Birmingham, and arraigned. In February 1981 counsel was appointed for the first time and trial was held in May 1981.

Taylor asserted his right to a speedy trial when the case was brought to trial. A lengthy motion to quash was heard, the only issue being the speedy trial question. No other issue was ever raised by Taylor or by the State.⁶

Only a cursory review is required to illustrate that this case was properly decided on speedy trial grounds. The four-pronged test of Barker v. Wingo, supra, compelled a finding of denial of Taylor's Speedy Trial rights by the state appellate courts. The length of the delay was four years and nine months from indictment to trial, and as such would be generally presumed sufficient to warrant further inquiry into the remaining Barker factors.

6. THE COURT: Tom, [Deputy D.A. Thomas M. Sowa] what are you going to contend, that he was not denied a speedy trial, they just couldn't find him, or what?

MR. SOMA: Yes, sir, that's part of it. Plus he was informed of the charges when he was originally arrested, which he completely denied from the stand.

Respondent made no attempt to assert his right prior to trial. However, he testified that he was unaware of the charge until he was arrested, and that he did not know the specifics of it until he obtained counsel on February 15, 1981. Obviously he could not assert the right if he was unaware of the charge. Thus his delay in assertion was only three months at the most, at least part of which was required to unravel the chain of events. Further, as set out in Barker, supra, presuming waiver of a fundamental right from a silent record is impermissible, and nothing appears in the entire record to indicate acquiescence in the delay by Taylor. 407 U.S. 514, at 524, 529.

The reason for the delay lies entirely at the feet of the State. As a result of simple ineptitude no detainer was placed after the True Bill was obtained. The District Attorney knew Taylor was in prison because he lodged the initial detainer when his parole was revoked. As a consequence, Taylor was released in mid-1977 by the prison authorities and told he had served his time. For fourteen months following his arrest he sat in a state penal institution one hundred miles from the site of the trial. During this period the State tried to serve him in Birmingham. Eighteen months after his release, thirty months after the crime, they began searching for him in the penitentiary. His court file was lost; the capias was lost. Finally, five years after his initial arrest, one of which he spent in prison, he was arrested again almost by mistake. This Court settled in Barker, supra, that while negligence does not weigh as heavily against the government as intentional delay, it must nonetheless be considered as the responsibility for bringing the case to trial rests with the government. 514 U.S. 514, at 531.

While Barker, supra, allows the presumption of prejudice where all other factors are met, Taylor was actually prejudiced by loss of

the opportunity to obtain a sentence concurrent with his parole revocation. See Smith v. Hooey, supra., at 378. Local attorney Charles Purvis testified that concurrent sentences were much more prevalent in 1976 than in the climate of 1981.⁷

Under the instant circumstances the case was ably decided by the Alabama Court of Criminal Appeals and it was decided only on Speedy Trial grounds. (Appendix A) At the present level Petitioner now argues that Speedy Trial standards should not have applied as Respondent was not actually served with the *capias* until January 1981 and that, thus Due Process standards and not those of Speedy Trial should apply. Respondent submits that he was actually, if not constructively, "arrested" when he was held in jail, charged with the offense and, as a result thereof, was deprived of his parole and compelled to serve fourteen months in state custody during which time the indictment existed. To hold otherwise, to borrow from the brief of Petitioner, would truly seem to hold "form over substance."

Additionally, the record consists of some one hundred and forty-four pages of testimony, none of which deals with any issue other than Speedy Trial. On appeal, Respondent raised the denial of his right to a speedy trial based on Barker, Klopfer, and Smith. In opposition, the State argued that his Speedy Trial right was not abridged. (Appendix D) The Alabama Court of Criminal Appeals reversed his conviction and quashed the indictment. The State applied for rehearing raising the same issue, and additionally

7. Q. [Mr. Dawson, Respondent's court counsel] All right. Was it possible in 1976 or '77 to get concurrent time, say, if an individual were on parole and was revoked and had like another year or so to serve, was it possible and probable at that time that that individual could plead a new case and get concurrent time with some of that?

A. Yes, sir. It was a lot easier back then than it is now. I'm not going to say that it's impossible to do it now, but it's hard to do now. It was a lot more common back then, Mr. Dawson, that you could do it. (R. 77)

raised the Due Process issue for the first time. Rehearing was denied without opinion. (Appendix A) The State then petitioned the Supreme Court of Alabama for a writ of certiorari and it was again denied without opinion. (Appendix B)

It is axiomatic in Alabama appellate practice that a court will not consider on appeal a constitutional question not raised in the trial court. Moore v. State, 415 So.2d 1210 (Ala.Crim.App. 1982), Streeter v. State, 406 So.2d 1024, cert. denied, 406 So.2d 1024 (1981), see Beasley v. State, 408 So.2d 173, cert. denied, 408 So.2d 180 (1980).⁸ Petitioner never raised the Due Process question at the trial level, did not do so on appeal in the first instance and when Petitioner did so on application for rehearing it was not considered or addressed by the appellate courts, all subsequent appeals being denied without opinion.

This Court has traditionally refused to consider constitutional questions on appeal from state courts where such questions were not seasonably presented in the courts below, and specifically where raised for the first time on rehearing which the state court denied without opinion. Hanson v. Denckla, supra. Though jurisdiction may exist where the state court nonetheless addressed the issue on rehearing, where the court does not do so the law seems settled. The established general rule is that an attempt to raise a federal question after judgment, or rehearing, comes too late unless the court actually entertains the question and decides it. Herndon v. Georgia, supra. In speaking specifically to 28 U.S.C., §1257, the

8. "We note, however, that the appellant completely missed the obligatory hurdle for appellate review when he failed to raise this question at the trial below." Constitutional rights must be seasonably raised in the lower court. 408 So.2d 173, at 179.

statute invoked by Petitioner to confer jurisdiction, this Honorable Court has historically held that unless both the raising of the federal question and the decision thereon appear on the record then this Court's appellate jurisdiction fails. Cardinale v. Louisiana, supra.

The above authorities all involved assertions by an accused of constitutional rights not claimed in state courts below. Few authorities exist involving failure by a state to raise such issues. However, as recently held in Illinois v. Gates, supra:

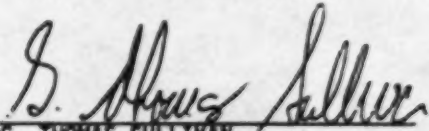
Our prior decisions interpreting the "not pressed or passed below" rule have not, however, involved a state's failure to raise a defense to a federal right or remedy asserted below. As explained below, however, we can see no reason to treat the state's failure to have challenged an asserted federal claim differently from the failure of a proponent of a federal claim to have raised that claim. ____ U.S. ____.

In declining to modify the federal excusatory rule therein this Honorable Court further noted that the State of Illinois never raised that question below in any respect, and that no Illinois decision in the case indicated that the question was ever considered.

CONCLUSION

Based on the foregoing authorities, the record, briefs and opinions below and the briefs of parties herein, Respondent respectfully submits that the issue was properly decided below and that this Honorable Court further lacks jurisdiction to consider the issue raised in Petitioner's petition for writ of certiorari and that in consequence thereof, the writ should be denied.

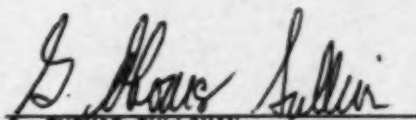
Respectfully submitted,

A handwritten signature in dark ink, appearing to read "G. Thomas Sullivan", is written over a horizontal line.

G. THOMAS SULLIVAN
ATTORNEY FOR RESPONDENT
515 Twenty-First Street, North
Birmingham, Alabama 35203
(205) 323-1061

CERTIFICATE OF SERVICE

I do hereby certify that I have on this the ____ day of
SEPTEMBER, 1983, served a copy of the above and foregoing
on Honorable Charles Graddick, Attorney General, Petitioner, by
placing a copy of the same in the U.S. Mail, addressed to Office
of the Attorney General, 250 Administrative Building, 64 North
Union Street, Montgomery, Alabama 35130, with first class postage
prepaid.


G. THOMAS SULLIVAN
ATTORNEY FOR RESPONDENT
515 Twenty-First Street, North
Birmingham, Alabama 35203
(205) 323-1061

STATE OF ALABAMA,

PETITIONER,

vs.

HENRY TAYLOR,

RESPONDENT.

IN THE SUPREME COURT
OF THE UNITED STATESNO. 82-2107MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Comes now G. Thomas Sullivan pursuant to Rules of Supreme Court, Rule 46, as state court appointed counsel for Henry Taylor, Respondent in the above cause, and on behalf of said Respondent moves for leave of this Honorable Court to proceed in forma pauperis and to be appointed counsel for said Respondent at this level, and in support thereof avers as follows:

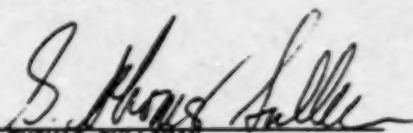
1. That on May 26, 1981, subsequent to the trial of this cause in the Circuit Court of Jefferson County, Alabama, by other court appointed counsel, he was then appointed by the Honorable Charles Wice, Circuit Judge, to represent Respondent Taylor on appeal in the courts of Alabama.

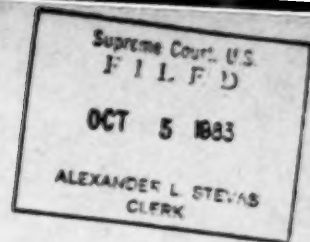
2. That on February 1, 1983 the conviction of Respondent Taylor was reversed by the Court of Criminal Appeals of Alabama, that the application for rehearing filed in that Court by the State of Alabama was denied and that a subsequent petition for writ of certiorari filed by said State in the Supreme Court of Alabama was also denied.

3. That on or about June 23, 1983 the said State filed the instant petition for writ of certiorari in this Honorable Court and served a copy on the affiant as counsel for Respondent.

4. That the affiant has never seen, heard from or spoken to Respondent, though he has written to him at his last known address, that his whereabouts are unknown but that he is still presumably indigent, not possessed of any property and unable to hire counsel.

Wherefore, affiant prays that this Honorable Court will grant him leave to proceed in forma pauperis, appoint him as counsel to represent Respondent Taylor and waive the requirement that Respondent file an affidavit in support of this Motion.


G. THOMAS SULLIVAN
ATTORNEY FOR RESPONDENT
515 Twenty-First Street, North
Birmingham, Alabama 35203
(205) 323-1061



NO. 82 - 2107

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1982

STATE OF ALABAMA,
PETITIONER,

VS.

HENRY TAYLOR,
RESPONDENT

APPENDIX

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF
CERTIORARI TO THE SUPREME COURT
AND
COURT OF CRIMINAL APPEALS OF ALABAMA

OF

G. THOMAS SULLIVAN
515 Twenty-First Street, North
Birmingham, Alabama 35203
(205) 323-1061

ATTORNEY FOR RESPONDENT

TABLE OF APPENDICIES

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Respondent adopts the Appendicies provided with Petitioner's petition for writ of certiorari which were identified therein as follows:

APPENDIX A - OPINIONS AND ORDERS OF THE COURT OF CRIMINAL APPEALS OF ALABAMA

OPINION, FEBRUARY 1, 1983

ORDER DENYING REHEARING,
MARCH 1, 1983

ORDER GRANTING STAY PENDING
CERTIORARI IN U.S. SUPREME
COURT, MAY 17, 1983

APPENDIX B - ORDERS OF THE SUPREME COURT OF ALABAMA

ORDER DENYING CERTIORARI,
APRIL 29, 1983

APPENDIX C - CODE OF ALABAMA, 1975

TITLE 13, SECTION 13-3-110

TITLE 15, SECTION 15-3-7

Respondent would amend the aforesaid Appendicies by inserting the following:

APPENDIX D - PETITIONER'S BRIEF AND ARGUMENT, COURT OF CRIMINAL APPEALS OF ALABAMA..... 1

CERTIFICATE OF SERVICE 18

SIXTH DIVISION

NUMBER 735

IN THE COURT OF CRIMINAL APPEALS OF ALABAMA

HENRY TAYLOR,

APPELLANT

VS.

STATE OF ALABAMA,

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

BRIEF AND ARGUMENT

OF

CHARLES A. GRADDICK
ATTORNEY GENERAL

AND

BILL NORTH
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR APPELLEE

ADDRESS OF COUNSEL:
Office of the Attorney General
250 Administrative Building
64 N. Union Street
Montgomery, Alabama 36130

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STATEMENT OF THE CASE

In its September 1976 term, a Jefferson County Grand Jury indicted Henry Taylor, the Appellant, on a charge of robbery. (R. 146).

On February 13, 1981, the Honorable Richard Hughes was appointed trial counsel for Mr. Taylor. On that same date the Appellant was arraigned and entered a plea of not guilty. (R. 148).

On May 26, 1981, a Motion to Dismiss was filed on behalf of the Appellant, alleging that he had been unconstitutionally denied the right to a speedy trial. (R. 149-151).

Proceedings were had on the Motion beginning on May 26, 1981. It was denied. The parties agreed to stipulate a prima facie case and perfect the speedy trial issue for appeal. Appellant was sentenced to a term of ten (10) years in the State penitentiary. Appellant gave notice of appeal, was declared to be indigent, and counsel was appointed. (R. 1-144; 133-144; 152, 153).

ISSUE PRESENTED FOR REVIEW

WHETHER THE APPELLANT WAS DENIED HIS CONSTITUTIONAL
RIGHT TO A SPEEDY TRIAL? (NO)

Barker v. Wingo, 407 U.S. 514, 33 L.
Ed. 2d 101, 92 S. Ct. 2182 (1972)

Crawford v. State, (Ala. Cr. App.
1977), 342 So. 2d 450

Wade v. State, (Ala. Cr. App. 1980),
381 So. 2d 1057

STATEMENT OF THE FACTS

Proceedings were had in this cause on May 26, 1981,
in the absence of a jury, and before the Honorable
Charles Nice, during which certain facts relevant to the
underlying charge were stipulated to, and evidence was
heard relevant to the Motion to Dismiss filed for an
alleged denial of Appellant's right to a speedy trial.

Testimony was heard that:

The Appellant, Henry Taylor, had been released from
the Alabama Prison System on December 8, 1975, and had
been placed on parole. (R. 4).

On May 24, 1976, Taylor was arrested with two other
men and charged with robbery. (R. 4, 34).

At the hearing the Appellant denied that he was involved in the robbery, or that he had been arrested on the robbery charge on May 24, 1976, by David Montgomery of the Fultondale Police Department, or that he had ever been in the Fultondale Police Department to be printed. (R. 16, 17, 26, 27).

The Appellant said he didn't remember what he was doing on May 24, 1976. (R. 31). The Appellant claimed that he was at his Montgomery residence when he was arrested on the charge; however, it is not clear from the record whether he is referring to the earlier arrest date in late May of 1976 or the later arrest in February of 1981. (R. 5, 6, 20, 21, 22).

He also claimed that the first time he was aware of the robbery charge was at the "indictment reading" in 1981. (R. 9).

Officer Montgomery testified, however, that when he had arrested the three men of whom Appellant seemed to be one, that he had informed him he was charged with robbing a service station. (R. 62-65).

As a result of this May 1976 arrest, Appellant's parole was revoked and he was sent to Kilby Prison. (R. 6, 7, 34). He was placed on hold. (R. 48).

Deputy District Attorney Sowa testified that after the May 24, 1976, arrest, a preliminary hearing was scheduled and then waived on June 17, 1976. Evidently, because of a mix-up regarding the names of the suspects as well as confusion regarding "who had done something" (R. 39), the case was originally "No-billed" by the Grand Jury on July 16, 1976. (R. 24, 25, 35).

Witness Sowa testified that he had been informed by John Black, who had handled the case (R. 34), that after the No-Bill was brought down, the hold on Appellant was withdrawn. (R. 48).

Subsequently to this, on September 10, 1976, a True-Bill was returned by the Grand Jury. (R. 36). Sowa did not know if another hold was placed on Appellant. (R. 49). The D.A.'s file did not reflect that further action was taken by that office (R. 37); however, it would not reflect that an attempt was made to put a hold on Appellant Taylor while he was serving his time. (R. 37).

Following the indictment, on September 28, 1976, the Jefferson County Sheriff's Department attempted to serve a Writ of Arrest on Appellant; however, because Appellant was at that time in prison serving his parole revocation time, he was not found at his Jefferson

County address, and the warrant was not executed. (R. 40).

The Appellant remained in the prison system as a result of this revocation until July 27, 1977, approximately ten months after the indictment. (R. 7). Following this, he married and moved to Montgomery, where he held several jobs. (R. 8). He said that he did not know that anyone was looking for him or trying to arrest him. As far as he knew, there were no holds on him. He didn't have to report to a parole officer after his release. (R. 9, 10). A letter from the Board of Corrections had indicated that he was being released at the end of his sentence. (R. 3, 4, 10, 11).

During the time of Appellant's imprisonment, Police Officer Montgomery had called Deputy District Attorney Black, who was handling the case, approximately six to eight months after the May 1976 arrest, to check on the case's progress. Mr. Black told him that Appellant's parole had been revoked and that he had gone to the penitentiary, but that the State intended to prosecute the charge. (R. 59). The record is not clear regarding what happened to Appellant's files subsequent to this, but on January 3, 1978, an alias warrant was issued on Appellant, and was again served at his Jefferson County

address. Although he was out of prison he was now evidently in Montgomery and the warrant was again not executed. (R. 49, 50).

On December 20, 1978, an order was issued to bring Appellant in for arraignment. Again he was not located. (R. 51).

At the hearing, the Court read from the Court record that on January 3, 1979, the Court had ordered that, as the original capias had been lost, an alias capias would be issued. This was also returned because Appellant was not at the Jefferson County address. (R. 43, 49, 50).

The case was set for January 18, 1979, and the Department of Corrections was ordered to have the Appellant in the Jefferson County Jail by January 17, 1979. Appellant was not found to appear at the January 18 arraignment. On that date the Department of Corrections was ordered to have Appellant in custody by February 14, 1979. Again he was not found. At this time presumably it was assumed that the Appellant was still in prison, and that the Department of Corrections still had custody over him. (R. 45, 46).

The Appellant was not located until he was involved in a car wreck on Christmas Eve. He was arrested in

January, 1981. He said that he was not aware of the Jefferson County arrest warrant until this time. (R. 16).

The Appellant produced criminal trial lawyers at the hearing to testify that there were disadvantages to being tried in 1981 as opposed to 1976. (R. 65-83, 85).

Witness Purvis, a former prosecutor with the D.A.'s Office, and for some years a criminal defense lawyer, said that when his clients were revoked on parole or probation and had a new offense that a detainer was placed on them in prison. (R. 72). This was a law enforcement function. (R. 74). It was the responsibility of the D.A.'s Office to get the detainer "in motion." (R. 73, 74). He said that before the computer set cases that district attorneys had discretion regarding when to bring cases to trial. (R. 80).

On cross examination witness Purvis said that he had left the D.A.'s office in 1972.

Deputy Robert Horst said that he was employed by the Jefferson County Sheriff's Department, assigned to the warrant detail. He had tried to serve the arrest warrant on Appellant in September 1976. He and his partner had looked for Appellant at both his home and

business addresses in Jefferson County and had not been successful. (R. 99, 100).

The January 3, 1978, alias writ of arrest had also been attempted to be served, but also unsuccessfully. (R. 102, 105). The stamp "not executed" was filled in January 11, 1979. (R. 106, 107).

On the top of the warrant was the notation "D.A.'s list," which would mean that "it needed attention from the D.A.'s Office." The witness assumed that the D.A.'s Office believed that Appellant was out of prison and in North Birmingham. (R. 108-110).

During the hearing the State offered Appellant's social security card, taken from Appellant at the Fultondale Police Department at the time of his arrest, and a fingerprint card, also taken at that time, as exhibits. (R. 27-30). (On redirect the Appellant denied that it was his social security card [32]).

Witness Sandra Triplett testified that she was a fingerprint expert, that she had examined State's Exhibit 2, a fingerprint card from the Fultondale Police Department, and compared it with State's Exhibit 3, another fingerprint card, and that the fingerprints of the two Exhibits matched. (R. 95-98). State's witness Rowe testified that Appellant's fingerprints were shown on Exhibit 3. (R. 115, 116).

During the final stages of the proceedings, the facts of the robbery were stipulated to by the parties, with the Appellant being identified as the gun man in the holdup. (R. 133-135).

ARGUMENT

THE APPELLANT WAS NOT DENIED HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL.

The Attorney General concurs with the Appellant by noting that when the denial of the right to a speedy trial is claimed, courts must examine and balance the effect of four factors: length of the delay, reasons for the delay, the accused's assertion of the right, and the prejudice suffered by the accused because of the delay. Barker v. Wingo, 407 U.S. 514, 33 L. Ed. 2d 101, 92 S. Ct. 2182 (1972). Appellant's brief at 9.

Examining these four factors:

To begin, the Attorney General would agree with the trial court hearing the motion that, if the State was negligent at all, it was for that period of time between Appellant's September 1976 indictment, after which the hold on him was apparently not reissued, and his release from prison on July 27, 1977. After that, as the court observed, the State didn't know where he was. (R. 112-

114). And that ten month period would not have been enough to be a denial of a speedy trial. (R. 130-132). It would not be such an inordinately lengthy delay as to weigh heavily against the State. Wade v. State, (Ala. Cr. App. 1981), 381 So. 2d 1057, 1059 (referring to twenty-one month period).

Also, while the time which lapsed between Appellant's arrest, or his indictment, and his trial, is important, in itself the lapsed time period is not determinative of the denial of a speedy trial. As Appellant also admits, the other factors must be examined and balanced. Barker, id. And the State contends that such an examination will demonstrate that: the Appellant was aware of the arrest charge against him, yet made no effort to seek trial; the State made a good faith effort to locate Appellant in order to try him; and the Appellant has not demonstrated specific grounds of prejudice resulting from any delay.

Regarding the Appellant's responsibility for asserting his right to a speedy trial, whether or not Appellant was aware of the indictment of September 1976, he was aware of the robbery charge through his arrest on May 24, 1976. (R. 4, 34). There was evidence that he had been taken to the Fultondale Jail and fingerprinted.

(R. 27, 28-30). Officer Montgomery had informed Appellant of the charge of robbing the service station when he arrested Appellant and the two other black males almost immediately after the robbery. (R. 62, 63).

Evidence was introduced that the Appellant had been convicted of prior felonies. (R. 11-13). He was no stranger to the judicial system, he was aware that he had been arrested for robbery even if he was not aware of the September indictment, and he made no effort to seek an early trial.

While it may be true that a defendant has no duty to bring himself to trial, his failure to assert his right would make it difficult for him to prove that he was denied a speedy trial. Wade, id at 1060 (citing Barker supra, 407 U.S. at 532, 92 S. Ct. at 2193).

The State would also contend that while Wade states that a defendant cannot waive his right to a speedy trial unless he has knowledge of the indictment (Wade, id at 1060), what is meant by this is that he be aware that he has been charged with a crime. The State argues that his arrest soon after the robbery was adequate notice of this to Appellant.

While the Appellant did not seek an earlier trial on the offense of which he was aware, the State did make

diligent and good faith efforts to locate him and bring him to trial.

Soon after the Grand Jury September 1976 indictment, the Sheriff's Department made an effort to locate Appellant at his old Birmingham address. He was not there, of course, being still in prison. Again, in January 1978, an alias warrant was issued and returned "not found." While Appellant had in the interim been released from prison, he had moved to Montgomery, and was not, consequently, at the old Jefferson County address.

In December 1978 and January 1979, the State attempted to locate Appellant and bring him to trial, but he was still in Montgomery and not in Jefferson County.

Regarding the inability of the State to bring Appellant to trial earlier, the Attorney General contends that the State was not "inactive" or "grossly negligent," as Appellant claims. Rather, efforts were made, one being immediately after the indictment was brought forth, to bring Appellant to trial.

Even if there had been negligence on the part of the State in not reestablishing the hold order on Appellant after the September 1976 indictment,

negligence is not weighed as heavily against the State as would be deliberate attempts by the prosecution to delay the trial in order to hamper the defense. Wade, id., at 1059 (In Wade there was no explanation offered for an eighteen month period of the delay). It has also been stated that for a (prearrest) delay to require dismissal of charges against the accused, the delay must have been purposeful. Crawford v. State (Ala. Cr. App. 1977), 342 So. 2d 450, 451; See, also Chambliss v. State (Ala. Cr. App. 1979), 373 So. 2d 1185, writ denied Ex parte Chambliss, 373 So. 2d 1211.

In Turner v. State, (Ala. Crim. App. 1979), 378 So. 2d 1173, writ denied 378 So. 2d 1182, this Court held that a defendant's right to a speedy trial was denied where there was a 25-month delay between the indictment and the trial, and the delay was attributable to "actions and inaction" of county officials. However, the Court also found that there was no effort made by the district attorney to bring the defendant to trial, even though his office had known of the Appellant's incarceration in Georgia when the original case was made. Also, in Turner the Court found that the accused had requested disposition of all untried indictments four months after indictment. Id. at 1178, 1179. See,

also, Slaughter v. State, 377 So. 2d 625, reversed and remanded, Ex parte Slaughter (Ala. 1979), 377 So. 2d 632, reversed and rendered, 377 So. 2d 634

(distinguished from the instant case on the ground that the accused had asserted his right to a speedy trial).

The Attorney General would also argue that it would be one thing to contend that if the prosecution had deliberately delayed Appellant's trial in order to gain some type of advantage, the Appellant's rights would have been unconstitutionally violated. Of course, such was not the case here. It is quite another thing, however, to argue that the public's right to be protected from dangerous persons must give way when mere bureaucratic confusion or mischance results in delay, especially when the accused has not shown, specifically, how he was prejudiced by such delay. In modern government, unfortunately, bureaucratic snafus are inevitable, where bureaucracies are run by fallible human beings. See, Crawford v. State, supra at 451.

Finally, an analysis of Appellant's claims of prejudice reveals that they are speculative, and that he can point to no actual prejudicial effect on his trial from the delay.

The Appellant contends that he was prejudiced in locating potential witnesses, yet he points to no

witnesses he could have used or would have sought.

He says that the primary issue would have been identification, and (presumably) the passage of time would have made this more difficult yet the Attorney General observes that the identification of Officer Montgomery, combined with the correspondence between the fingerprint card made at the Fultondale Police Department immediately after the robbery with that made of Appellant before the trial, was sufficient to establish Appellant's identity.

The other allegations of prejudice have nothing to do with proof of guilt, but have only to do with supposed alterations in policy regarding plea bargaining and sentencing of the Jefferson County prosecutorial and court system. These are vague allegations and suppositions and are irrelevant to the issue of Appellant's ability (or lack of it) to establish his own innocence. See, Chambliss v. State (Ala. Cr. App. 1979), 373 So. 2d 1185, writ denied Ex parte Chambliss, 373 So. 2d 1211. (A substantial and actual prejudice must be shown); Crawford, supra.

For the reasons discussed above, viz., that, if the State was negligent at all in delaying Appellant's trial, that delay was only for the period during which

Appellant was in prison - after that his whereabouts were unknown; and that the Appellant, although he had been arrested for the robbery, made no request for a speedy trial; and that the prosecution's delay was not willful or grossly negligent; and that the Appellant has not demonstrated specific prejudice, the State would argue that the Appellant was not denied his right to a speedy trial.

CONCLUSION

The State, therefore, respectfully requests the court to affirm the judgment of the trial court.

Respectfully submitted,

Charles A. Graddick

CHARLES A. GRADDICK
ATTORNEY GENERAL

Bill North

BILL NORTH
ASSISTANT ATTORNEY GENERAL

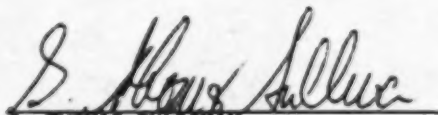
CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of November, 1982, I did serve a copy of the foregoing Brief and Argument on the attorney for the Appellant, Hon. G. Thomas Sullivan, 2014 6th Avenue, North, Birmingham, Alabama, 35203, by placing said copy in the United States Mail with postage prepaid.

Bill North
BILL NORTH
ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I do hereby certify that I have on this the ____ day of September, 1983, served a copy of the above and foregoing on Honorable Charles Graddick, Attorney General, Petitioner, by placing a copy of the same in the U.S. Mail, addressed to Office of the Attorney General, 250 Administrative Building, 64 North Union Street, Montgomery, Alabama 36130, with first class postage prepaid.



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